

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4057

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

Nos. 77-4057, 77-4067, 77-4068,
77-4073, 77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
SECURITIES INDUSTRY AUTOMATION CORPORATION,
UNITED SYSTEM SERVICE, INC.,
AERONAUTICAL RADIO, INC.,
AIR TRANSPORT ASSOCIATION OF AMERICA,
TELENET COMMUNICATIONS CORPORATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

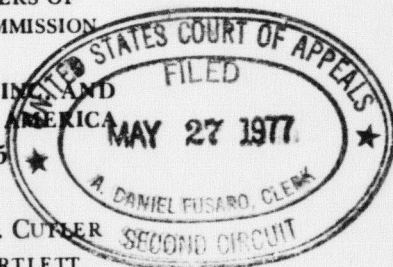
AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF AERONAUTICAL RADIO, INC. AND
AIR TRANSPORT ASSOCIATION OF AMERICA

Petitioners in No. 77-4075



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(i)

TABLE OF CONTENTS

Page

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES	iii
PRELIMINARY STATEMENT	1
ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
I. Background: Communications Common Carrier Tariffs for Private Line Service	3
II. Since 1937 the FCC Has Required AT&T To Recognize ARINC as a Customer So that a Single Entity Could Provide for the Entire Air Transport Industry Communications Service Needed for the Safety and Efficiency of Flight	6
A. ARINC Was Organized as a Radio Communi- cations Company in 1929	6
B. The FCC's 1937 Decision in <i>ARINC v. AT&T</i> Mandated Single Customer Status for ARINC Under AT&T's General Tariff Provisions	7
C. The Air Transport Industry's Need For Com- munications Grew Rapidly and the Carriers Recognized ARINC's Customer Status by a Special Tariff Provision	8
III. The FCC's <i>Resale and Shared Use</i> Order, Under Review Here, Approved ARINC's Single Customer Status and Role as the Communications Company of the Air Transport Industry, but Struck Down the Tariff Provisions Which Recognize ARINC's Customer Status	11
A. Background of the FCC's Proceeding	11
B. The FCC's Notice of Inquiry and Proposed Rulemaking	13
C. The FCC's "Notice and Comment" Rulemaking Proceeding	14
D. The FCC's Orders	15
SUMMARY OF ARGUMENT	16

ARGUMENT

I. The FCC's Ultimate Conclusion that Tariff Provisions Recognizing ARINC's Single Customer Status Were Unlawful Is Not Consistent with the Communications Act, the FCC's Prior Holding in <i>ARINC v. AT&T</i> , or the FCC's Own Findings in the Proceeding Below	18
A. The FCC's Action Is Contrary to Section 201(a) of the Communications Act Which Mandates that Carriers Furnish Service to ARINC "Upon Reasonable Request Therefor".	19
B. The FCC's Action Is an Unjustified Departure from Its Ruling in <i>ARINC v. AT&T</i> that ARINC Is Entitled to Customer Status and Its Findings Below that ARINC's Communications Operations on Behalf of the Air Transport Industry "Serve an Important Public Function and Should Be Encouraged"	22
II. The FCC's Action Was Irrationally Overbroad Because the FCC's Adverse Findings Relating to ARINC's Customer Status Were Limited Solely to the Question of Telpak Rates, and Cannot Support a General Conclusion Adverse to ARINC's Customer Status for Any Other Service	27
III. The FCC's Conclusions Regarding Telpak Rates Are Irrelevant, Unlawful, and Unsupported	29
A. The FCC, Without Notice, Improperly Decided Issues Relating to Telpak Rates, Which Were Not Involved in the Proceeding Below	29
B. The FCC Failed To Accord ARINC and ATA a Full Evidentiary Hearing on the Complex Factual Questions Underlying the Competitive Necessity of Telpak	31
C. The FCC's Conclusion that There Is No Competitive Necessity for ARINC To Obtain Telpak Rates Is Arbitrary and Capricious and Unsupported by Substantial Evidence	33
CONCLUSION	36

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Page

Court Cases:

<i>American Airlines, Inc. v. CAB</i> , 359 F.2d 624 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966)	33
<i>Columbia Broadcasting System, Inc. v. FCC</i> , 454 F.2d 1018 (D.C. Cir. 1971)	25
<i>Fidelity Television, Inc. v. FCC</i> , 515 F.2d 684 (D.C. Cir.), cert. denied, 423 U.S. 926 (1975)	25
<i>Hawaiian Telephone Co. v. FCC</i> , 498 F.2d 771 (D.C. Cir. 1974)	28
<i>Independent Bankers Ass'n v. Board of Governors</i> , 516 F.2d 1206 (D.C. Cir. 1975)	32
<i>Mobil Oil Corp. v. FPC</i> , 483 F.2d 1238 (D.C. Cir. 1973)	32
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968)	35
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943)	28

Statutes:

Administrative Procedure Act:

Section 4, 5 U.S.C. § 553	14
Section 4(b)(3), 5 U.S.C. § 553(b)(3)	30
Section 10(e)(2)(A), 5 U.S.C. § 706(2)(A)	19
Section 10(e)(2)(C), 5 U.S.C. § 706(2)(C)	19

Communications Act of 1934:

Section 201(a), 47 U.S.C. § 201(a)	17, 19, 20, 21
Section 202(a), 47 U.S.C. § 202(a)	20, 21
Act of June 18, 1910, 36 Stat. 539	3

Commission Opinions:

<i>Aeronautical Radio, Inc. v. American Telephone and Telegraph Co.</i> , 4 F.C.C. 155 (1937)	passim
<i>Allocation of Frequencies in the Bands Above 890 Mc.</i> , 27 F.C.C. 359 (1959), reconsideration denied, 29 F.C.C. 825 (1960)	9

*Commission Opinions, continued:*Page

<i>American Trucking Associations v. American Telephone and Telegraph Co.</i> , 41 F.C.C.2d 2 (1973)	12, 29
<i>Private Wire Contracts</i> , 50 I.C.C. 731 (1918)	3, 5
<i>In re Telpak Sharing Provisions of AT&T Co. and the Western Union Telegraph Co.</i> , 23 F.C.C.2d 606 (1970), <i>rev'd on other grounds sub nom. American Tel. & Tel. Co. v. FCC</i> , 449 F.2d 439 (2d Cir. 1971)	10

Miscellaneous:

AT&T Tariff F.C.C. No. 260	
¶ 2.2.1(A)	12
¶ 2.2.1(G)	12
AT&T Transmittal to F.C.C. No. 12714 (March 23, 1977)	16
Federal Radio Commission, 4th Annual Report (1930)	7
47 C.F.R. § 1.411 <i>et seq.</i>	14

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Petitioners in No. 77-4075

PRELIMINARY STATEMENT

In accordance with 2d Cir. Rule §28(2), the
following decisions appealed from were made by the

Federal Communications Commission (FCC):¹

In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097. The Report and Order (adopted July 1, 1976 and released July 16, 1976) is reported at 60 F.C.C.2d 261 (1976) (J.A. 28) (hereinafter cited as "Report and Order" or "Order").² The Memorandum Opinion and Order on reconsideration (adopted January 5, 1977 and released January 12, 1977) is reported at 62 F.C.C.2d 588 (1977) (J.A. 152) (hereinafter cited as "Reconsideration Order").³

ISSUES PRESENTED FOR REVIEW

In the proceeding below, the Federal Communications Commission (FCC), *inter alia*, concluded that unlimited resale and sharing of communications common carrier private line services is just and reasonable and that tariff restrictions against resale and sharing are unlawful. Specifically, the FCC allowed sharing of communications service through a non-profit intermediary. Petitioners, Aeronautical Radio, Inc. (ARINC) and the Air Transport Association of America (ATA), do not challenge this conclusion.

The narrow issue presented for review by ARINC and ATA is: Whether the FCC correctly held to be

¹The members of the FCC on July 1, 1976 were Richard E. Wiley (Chairman), Robert E. Lee, Benjamin L. Hooks, James H. Quello, Abbot M. Washburn, and Glen O. Robinson, Jr. By January 5, 1977, Commissioner Robinson had left the FCC and Margita E. White and Joseph Fogarty had joined it.

²Lee issuing a separate statement, Hooks concurring and issuing a statement, Robinson concurring in part and dissenting in part and issuing a statement.

³Lee absent, Hooks and Quello concurring in the result.

unlawful the "single customer" provision in certain carriers' tariffs, which permits Aeronautical Radio, Inc. (ARINC) to obtain service for the air transport industry, where the FCC had consistently for 40 years recognized ARINC's customer status, where the FCC found that the record in the proceeding under review showed that ARINC, in its role as customer, "serve[s] an important public function" that "should be encouraged," and where the ruling was based only on the erroneous consideration of a specific rate question not at issue in the proceeding below.

STATEMENT OF THE CASE

I.

BACKGROUND: COMMUNICATIONS COMMON CARRIER TARIFFS FOR PRIVATE LINE SERVICE.

This case involves review of FCC orders concerning the lawfulness of communications common carrier tariff provisions relating to sharing and resale of private line service. More than half a century ago, the Interstate Commerce Commission characterized the sharing and resale question as "a problem in which the practical and legal questions presented are complicated in the extreme." *Private Wire Contracts*, 50 I.C.C. 731, 763 (1918).⁴ This observation is still true today. Therefore, the Court may find the following background material on industry practices and terminology helpful.

⁴The ICC was given authority over interstate telephone and telegraph service by amendments to the Interstate Commerce Act on June 18, 1910. 36 Stat. 539. The FCC was created and obtained this jurisdiction by the Communications Act of 1934, 47 U.S.C. §151 *et seq.*

"Private line service" consists of the leasing of a dedicated channel for voice, telegraph, data, or other communications.⁵ Private line service allows communications only between the specified points to which the channel is connected, and is to be distinguished from the familiar "message telephone service," which offers the possibility of making dial-up connections with any other regular telephone.⁶ A combination of private lines may be arranged into a large and complicated communications network spanning the nation, such as that provided by ARINC for the air transport industry.

The "customer" of private line service, to adopt a term defined in most carrier tariffs, is the entity which orders the service from the carrier and is responsible for payment of the charges.

A customer for private line service may need it for any, or all, of the following uses:

- 1) For strictly internal communications of the customer, *e.g.*, between the main office of an airline "customer" and its own branch office;
- 2) For communications between the customer and others,⁷ *e.g.*, between an airline "customer" and an aircraft manufacturer;
- 3) For communications between two parties, neither of whom is the customer,⁸ as would be

⁵Other forms of service, *e.g.*, non-dedicated channels, may also be regarded as private line service in certain specialized applications.

⁶It is possible to combine private line and message telephone service.

⁷Some tariffs refer to such other parties as "authorized users."

⁸The tariffs refer to parties using the service this way as "authorized users," "joint users," or simply "users."

the case with either the intra-airline or airline/ aircraft manufacturer examples if ARINC were the customer for the service.

Since the earliest times, carriers have recognized and permitted the first two types of uses: those which involve communications to or from the customer. *Private Wire Contracts*, 50 I.C.C. at 744-45. Carriers have been more reluctant to allow the third type of use (referred to in the FCC's proceeding below as "resale" or "sharing" of service⁹) where the customer is not a direct party to the communication, and have incorporated various restrictions in their tariffs to prevent or limit such third-party use. 50 I.C.C. at 744-45. Until the proceeding under review was instituted, no one challenged the ICC's 1918 holding that "some reasonable restrictions" are "entirely proper and, from a practical standpoint, necessary in the interest of the public." *Id.* at 764. However, the carriers have made various exceptions to their restrictions on resale and sharing to meet customer needs for consolidated communications or, in some instances, to permit customers to share excess capacity. See Report and Order ¶¶ 31-33, 60 F.C.C.2d at 278-80 (J.A. 51-53).

⁹"Resale" involves a public offering for profit whereas "sharing" is a private, non-profit arrangement. See Report and Order ¶¶ 17-26, 60 F.C.C.2d at 271-76 (J.A. 41-47).

II.

SINCE 1937 THE FCC HAS REQUIRED AT&T TO RECOGNIZE ARINC AS A CUSTOMER SO THAT A SINGLE ENTITY COULD PROVIDE FOR THE ENTIRE AIR TRANSPORT INDUSTRY COMMUNICATIONS SERVICE NEEDED FOR THE SAFETY AND EFFICIENCY OF FLIGHT.

A. ARINC Was Organized as a Radio Communications Company in 1929.

The United States air transportation system operates a nationwide network of routes vital to meet the needs of the general public, business, and government. Communications — by radio, telephone, and telegraph — are essential to link aircraft in flight with ground personnel, to coordinate widespread airline activities on the ground, and for the public to make reservations and inquire about flight status.

In the early days of commercial flight, the Federal Radio Commission recognized the need for a central entity to coordinate point-to-point radio communications for the air transport industry, and held conferences with industry representatives which resulted in the formation of Aeronautical Radio, Inc. (ARINC) in 1929. ARINC is, in form, a Delaware business corporation, which has in fact always rendered its services on a not-for-profit, cost-sharing basis. ARINC's stock is held by those it serves, air carriers and non-carrier general aviation operators. ARINC Comments at 4-5 (J.A. 758-59).

The Federal Radio Commission described ARINC's responsibilities as "to coordinate more closely [air transport] radio activities and to assure dependable and adequate communications." FRC, 4th Annual Report

70 (1930). For some years after its founding, ARINC carried out this mission as the licensee of hundreds of radio stations throughout the country used for intercity point-to-point communications and for communications with aircraft in flight. ARINC Comments at 5 (J.A. 759).

B. The FCC's 1937 Decision in *ARINC v. AT&T* Mandated Single Customer Status for ARINC Under AT&T's General Tariff Provisions.

Airline requirements for point-to-point communications for air traffic control, weather, dispatch, passenger reservations, air mail, and cargo grew in the 1930's. At the same time, private line service became more available for the same uses as point-to-point radio. ARINC Comments at 6 (J.A. 760).

In order to continue to provide the communications service necessary for safe and efficient flight operations, ARINC sought to obtain from AT&T private line service for airline use, playing the same role as it did with radio service. This role was one of radio licensee, coordinator, and administrator. Radio equipment, leased to ARINC by the airlines, was located on airline premises and operated by airline personnel.¹⁰ Likewise, the private line circuits were to be ordered and administered by ARINC, but were to run between airline premises and be operated by airline employees.¹¹

¹⁰Since World War II, ARINC has taken on increasing operational responsibilities and now operates hundreds of radio stations and a nationwide computer message switching system. ARINC Comments at 8 n.4, 17-38 (J.A. 762 n.4, 773-94).

¹¹In other words, the use of the private line would be that described in example (3) on page 4-5, *supra*.

AT&T, however, originally denied ARINC the right to order private line service for the benefit of airline users on the grounds that its tariff required that the service be used "only for communications in which the customer or an authorized user has a direct interest" and not for "any communication for others." See *Aeronautical Radio, Inc. v. American Telephone and Telegraph Co.*, 4 F.C.C. 155, 156, 161 (1937) (hereinafter cited as "*ARINC v. AT&T*").

ARINC filed a formal complaint with the FCC requesting that AT&T be required to provide service to ARINC as a customer for the airlines. After a full hearing, the FCC found that the safety of life and property in the air required a "coordinated" radio and wire "system of communications" which only ARINC could provide. *Id.* at 163.

After this decision, the use of private line service by the air transport industry steadily grew, but the industry also became interested in other means of providing intercity communications. ARINC Comments at 9 (J.A. 763).

C. The Air Transport Industry's Need for Communications Grew Rapidly and the Carriers Recognized ARINC's Customer Status by a Special Tariff Provision.

The development of computerized central reservations and data processing systems as well as the large-scale introduction of jet aircraft in the late 1950's and early 1960's created an explosive demand on the part of the air transport industry for unprecedented quantities of instantaneous communications. ARINC Comments at 10, 12 (J.A. 764, 766). As early as 1955, ARINC had a recommendation from the independent

communications consultant firm of Arthur D. Little, Inc., that it participate in the development of a nationwide communications system, based in part on the use of a wartime development — microwave radio. *Id.* at 10 (J.A. 764).

Unlike the radio systems used by ARINC in the 1930's, microwave radio has the ability to transmit vast quantities of messages on a point-to-point basis with high reliability at a relatively low cost.¹² In a landmark decision, the FCC authorized shared use of privately owned microwave facilities by the airlines (and other rate-regulated entities) as an alternative to carrier-provided private line service to meet bulk communications requirements. *Allocation of Frequencies in the Bands Above 890 Mc.*, 27 F.C.C. 359 (1959), *reconsideration denied*, 29 F.C.C. 825 (1960).

In 1961, AT&T responded to the growing interest in private microwave by the air transport industry and others by filing its Telpak tariff, which provided for bulk communications at rates comparable to the cost characteristics of private microwave systems. Industries, such as the airlines, allowed by the *Above 890* decision to share private microwave also could share Telpak. ARINC Comments at 11 (J.A. 765).

During the next decade, by increasing the use of private line service ten-fold under the Telpak tariff, the airlines were able to enhance service to the public by such improvements as interconnected reservations systems and centralized dispatching functions. ARINC Comments at 12 (J.A. 766).

¹²Indeed, microwave radio systems form a substantial part of the intercity transmission plant of AT&T and other carriers.

At first, the industry relied on ARINC to administer most of its shared Telpak service, ordered by individual airlines, but this arrangement did not fully meet industry expectations of efficiency and equity. Consequently, in 1966 ARINC began plans to exercise its right to be the single customer for private line service for the industry, just as it would be the operator of an industry-wide private microwave system.¹³ ARINC Comments at 13 (J.A. 767). ARINC placed its order for a nationwide private line communications network with AT&T on September 12, 1967. ARINC Comments at 14 (J.A. 768).

On July 31, 1969, AT&T added to its tariff for private line service, F.C.C. No. 260, a new provision, ¶2.2.1(G), which recognized ARINC's customer status by authorizing use of private line service:

"For the transmission of communications to, from, within and between air carriers, where the customer is an aeronautical communications company licensed under the Aviation Services rules of the Commission to operate stations in the aeronautical mobile and fixed services."¹⁴

¹³The FCC recognized the comparability of ARINC's customer status and its status as licensee of private microwave systems in the *Telpak Sharing* case:

"Under the single customer concept in Telpak, ARINC, as the customer, could order the appropriate Telpak configurations and circuitry and then assign circuits to the airlines as their needs required. This is the same role that ARINC could perform as the single licensee of a private microwave system." 23 F.C.C.2d 606, 610-11 (1970), *rev'd on other grounds sub nom.* American Tel. & Tel. Co. v. FCC, 449 F.2d 439 (2d Cir. 1971).

¹⁴ARINC sought no tariff change, relying on its right to service as a customer established by the FCC in 1937. ARINC

[footnote continued]

Western Union filed a similar provision, and the tariff revisions became effective on September 1, 1969. Three months later, ARINC, as AT&T's "customer," implemented its nationwide Private Line Intercity Network (PLIN).¹⁵

Today, PLIN consists primarily of Telpak service, involving some 17,500 circuits, serving a wide range of aeronautical communications needs. *See* ARINC Comments at 17-38 (J.A. 773-94). Without this communications capability, the service now rendered by the air transport industry to the public would be impossible.

III.

THE FCC'S *RESALE AND SHARED USE ORDER*, UNDER REVIEW HERE, APPROVED ARINC'S SINGLE CUSTOMER STATUS AND ROLE AS THE COMMUNICATIONS COMPANY OF THE AIR TRANSPORT INDUSTRY, BUT STRUCK DOWN THE TARIFF PROVISIONS WHICH RECOGNIZE ARINC'S CUSTOMER STATUS.

A. Background of the FCC's Proceeding.

On September 1, 1972 the American Trucking Associations Inc., filed an amended formal complaint with the FCC questioning AT&T's failure to exempt motor truck carriers from general tariff requirements that private line service be used "[f]or the transmission

Comments at 14 n.10 (J.A. 768 n.10). However, ¶2.2.1(G) eliminated any possible problems presented by changes in AT&T's tariff regulations since 1937.

¹⁵PLIN became operational some two years before Telpak sharing was cancelled in December 1971, and ARINC's planning for PLIN began before any challenge had been filed against the Telpak sharing regulations. ARINC Comments at 13 n.9 (J.A. 767 n.9).

of communications to or from the customer and relating directly to the customer's business." AT&T Tariff F.C.C. No. 260 ¶ 2.2.1(A). The Truckers alleged that their industry suffered from discrimination because various other entities and industries (including ARINC) were not limited by these requirements by virtue of special "single customer" provisions in AT&T's private line tariff, such as ¶ 2.2.1(G) relating to ARINC's customer status.

The FCC, on May 23, 1973, instituted a hearing on the Truckers' complaint, on the question of whether AT&T's tariff provisions involved an unjust or unreasonable discrimination. *American Trucking Associations v. American Telephone and Telegraph Co.*, 41 F.C.C.2d 2 (1973). The Commission determined that the issues presented by the Truckers' complaint "should be resolved on the basis of an evidentiary hearing record." *Id.* at 5.

The Commission noted that the general tariff prohibitions against third party traffic, which were at the root of the truckers' failure to obtain service on the terms they desired, would not be investigated in the hearing, but were being considered for investigation in a separate proceeding. *Id.* at 6.¹⁶

¹⁶These general prohibitions had become a matter of concern to the FCC because of technological developments which enabled discrete communications channels to be used independently by a number of parties with great improvements in flexibility or efficiency. For example, devices called multiplexers could convert one private line into as many as 22 separate telegraph circuits. Also, computers could be used to enable many users to intercommunicate over a single network. Moreover, this new technology created the possibility of innovative communications services involving the resale of private line service obtained from AT&T or other carriers supplying basic transmission capacity.

B. The FCC's Notice of Inquiry and Proposed Rulemaking.

Before the evidentiary hearing on the truckers' complaint began, on June 26, 1974, the FCC promulgated a Notice of Inquiry and Proposed Rulemaking on regulatory policies concerning resale and shared use of common carrier services and facilities. 47 F.C.C.2d 644 (1974) (Docket No. 20097) (J.A. 12). This Notice instituted a broad investigation into all restrictions on resale or third party traffic in AT&T's and other carriers' tariffs, including issues on what justification there is for such restrictions, whether some or all such restrictions should be removed, and, if so, to what extent resale and sharing should be regulated.¹⁷

Regarding the "single customer" tariff provisions, the FCC terminated its investigation on the Truckers' complaint, 47 F.C.C.2d at 659 (J.A. 27), and incorporated the following two issues into the new proceeding:

"9. What is the justification for provisions of Section 2.2.1 of AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254 which accord special tariff treatment to the airlines, corporate conglomerates, stock exchanges and their members, and others? Do such tariff provisions, constitute in whole or in part, unjust or unreasonable discrimination, or subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202(a) of the Communications Act?

¹⁷In all, the FCC specified twelve items of inquiry. 47 F.C.C.2d at 656-57 (J.A. 24-25).

10. Should the provisions under consideration in question 9 be found to involve unlawful discriminations, what action should the Commission take to remove such unlawfulness? Fully justify any recommended tariff changes and discuss their consistency with any recommended changes with regard to resale and shared use of private line facilities in general." 47 F.C.C.2d at 657 (J.A. 25).

C. The FCC's "Notice and Comment" Rulemaking Proceeding.

In its Notice the FCC abandoned the evidentiary hearing it had deemed appropriate for the Truckers' complaint and adopted essentially the "notice and comment" rulemaking proceedings of Section 4 of the Administrative Procedure Act, 5 U.S.C. §553. The FCC augmented its usual procedural rules, 47 C.F.R. 1.411 *et seq.*, by providing for a third round of written comments. Also, the FCC undertook to take into account only material submitted for or incorporated into the record. 47 F.C.C.2d at 658 (J.A. 26).

Pursuant to these procedures, about 40 interested parties representing a wide diversity of carrier and user interests submitted a voluminous record. ARINC and ATA each submitted comprehensive Comments (J.A. 755 and 854), and jointly submitted Reply Comments (J.A. 1227) and a final Response (J.A. 1333). A wide variety of positions were taken by the parties, ranging from advocacy of the status quo through support for various degrees of relaxation of existing restrictions on resale or shared use.

In their concluding Response, ARINC and ATA stated to the Commission that "[t]he record in this hearing fully justifies the current service to ARINC as

the 'customer' of each carrier" and that "there has been no showing of 'unjust or unreasonable' discrimination" with regard to ARINC's customer status. ARINC and ATA indicated that, in any event, further evidentiary hearings would be required if the FCC should contemplate any adverse action with regard to ARINC's role serving the air transport industry. ARINC and ATA Response at 27 (J.A. 1359).

D. The FCC's Orders.

On July 1, 1976, the FCC adopted its Report and Order in this proceeding. The fundamental ruling of the Report and Order was that "unlimited resale and sharing of all services other than monopoly services [i.e., private line service] is just and reasonable, and that tariff provisions which prevent or restrict such practices are unjust and unreasonable, and thus unlawful." 60 F.C.C.2d at 321 (J.A. 109).

In connection with this ruling the FCC spelled out conditions under which private line service could be shared, including "sharing through a non-profit intermediary" such as ARINC. *Id.* The FCC held that such sharing was not common carriage subject to Title II of the Communications Act. 60 F.C.C.2d at 316 (J.A. 102).¹⁸ Moreover, the FCC indicated that non-profit intermediaries such as ARINC "will provide user groups with better management of their communications networks." 60 F.C.C.2d at 299 (J.A. 79).

In Appendix E of the Report and Order, 60 F.C.C.2d at 330 (J.A. 127), the FCC dealt with the single

¹⁸The Commission concluded that resale, on the other hand, did involve common carriage. 60 F.C.C.2d at 308 (J.A. 92).

customer tariff provisions. Appendix E concluded that "the single customer provisions are unlawfully discriminatory." 60 F.C.C.2d at 336 (J.A. 140). Specifically, Appendix E stated that "we find ARINC's single customer status with respect to Telpak to be unlawful." *Id.*

ARINC and ATA sought reconsideration of Appendix E, and requested the FCC to delete it and related holdings on single customer tariff provisions in a petition filed with the FCC on August 25, 1976. (J.A. 1528.) However, in a footnote to its Reconsideration Order, the FCC cursorily affirmed Appendix E. 62 F.C.C.2d at 598 n.15 (J.A. 165 n.15).

This appeal followed.

SUMMARY OF ARGUMENT

ARINC and ATA do not challenge the FCC's conclusion that AT&T's private line tariff contains unlawful restrictions on sharing.¹⁹ Indeed, the FCC's recognition that sharing arrangements using an industry-based, cooperative, non-profit intermediary can serve the public interest is substantially grounded on the record presented by ARINC concerning its role in serving the air transport industry. ARINC and ATA find nothing in the FCC's intent or language which would in

¹⁹ ARINC and ATA are concerned that AT&T has responded to the FCC's prescription of unlimited resale and sharing by proposing the elimination of Telpak and all bulk service. AT&T Transmittal to F.C.C. No. 12714 (March 23, 1977). However, we view this action as inconsistent with the FCC's statement in the Report and Order that it was not deciding the lawfulness of restrictions on resale and sharing applied to a "true 'bulk rate.'" 60 F.C.C.2d at 289 n.66 (J.A. 65 n.66).

any way inhibit or restrict the present method employed by ARINC to serve its industry.

ARINC and ATA do object, however, to the FCC's overbroad and irrational conclusion in Appendix E of the Report and Order that the single customer tariff provisions applicable to ARINC are unlawful. This is a matter of particular concern because other parties to this appeal have questioned the FCC's affirmative findings regarding sharing. If, as a result of these appeals, the FCC's requirement that sharing through non-profit intermediaries should be reversed, vacated, or subject to restrictive conditions, ARINC could well be left without the customer status to which it is clearly entitled, unless the FCC's unlawful striking down of the single customer tariff provisions is also reversed.

There are three grounds on which the FCC's conclusion in Appendix E regarding ARINC's single customer status must be reversed.

In the first place, the flat ruling that the tariff provision is unlawful is directly contrary to the FCC's finding that ARINC's role serves an important public function. Read as a whole, the FCC's Report and Order and Reconsideration Order unambiguously confirm ARINC's absolute right to order virtually all common carrier services as a single customer for the air transport industry. ARINC is accorded this right, both by §201(a) of the Communications Act and by the FCC's findings that ARINC's operations are in the public interest.

Second, the sole ground contained in the FCC's orders below for finding ARINC's single customer status unlawful is the FCC's finding that the single customer provision creates an unlawful rate discrimination with respect to Telpak service. It was irrational for the FCC

to hold that ARINC's customer status was unlawfully discriminatory insofar as any other service than Telpak is concerned.

Third, the FCC's conclusions with respect to Telpak rates cannot be affirmed. Fundamentally, Telpak rates were not even an issue in this proceeding, and the FCC deprived the parties of adequate notice and opportunity to comment on Telpak rate issues. Moreover, the FCC decided crucial, disputed facts against ARINC and ATA without according them the requisite full evidentiary hearing. Finally, the FCC's "analysis" of evidence from the proceeding where Telpak rates were at issue is so patently erroneous as to render its conclusions irrational and unsupported by substantial evidence.

Thus, the Commission's single customer order has no support whatsoever.

ARGUMENT

I.

THE FCC'S ULTIMATE CONCLUSION THAT TARIFF PROVISIONS RECOGNIZING ARINC'S SINGLE CUSTOMER STATUS WERE UNLAWFUL IS NOT CONSISTENT WITH THE COMMUNICATIONS ACT, THE FCC'S PRIOR HOLDING IN *ARINC v. AT&T*, OR THE FCC'S OWN FINDINGS IN THE PROCEEDING BELOW.

The FCC's sweeping conclusion "that the so-called 'single customer' provisions found in the carriers' tariffs are unjustly and unreasonably discriminatory, and accordingly unlawful" (60 F.C.C.2d at 321 (J.A. 109)) cannot be reconciled with its findings that ARINC's role under the single customer provision as the communications company of the air transport industry has served the public interest (60 F.C.C.2d at 299-300 (J.A. 79-80; 62 F.C.C.2d at 594-95 (J.A. 161))). The

irrationality of adopting a conclusion so deviant from the agency's own findings, as well as from its prior pronouncements and the dictates of the law renders the FCC's conclusion "arbitrary and capricious" and "short of statutory right." Such action must be set aside by the reviewing court under the standards of Section 10(e) of the Administrative Procedure Act. 5 U.S.C. §706(2)(A), (C).

A. The FCC's Action Is Contary to Section 201(a) of the Communications Act Which Mandates that Carriers Furnish Service to ARINC "Upon Reasonable Request Therefor."

The effect of the FCC's order holding single customer tariff provisions unlawful could be to deprive ARINC of the right to obtain needed communications service. Such a consequence would be in clear conflict with §201(a) of the Communications Act, which imposes a "duty" on carriers to furnish "communication service upon reasonable request therefor."²⁰

²⁰Section 201(a) provides:

"It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes." 47 U.S.C. §201(a).

ARINC advanced its right to service under §201(a) to the FCC in the proceeding below, indicating in detail the legal precedent supporting this position. This analysis appears in ARINC's Comments at 55-59 (J.A. 811-15). Since the FCC's orders do not seem to question ARINC's right to be served, this discussion need not be repeated or elaborated upon.

The FCC, however, has asserted a totally erroneous view of the relationship between §201(a) and §202(a) (prohibiting carriers from making any "unjust or unreasonable discrimination," "undue or unreasonable preference or advantage," and "undue or unreasonable prejudice or disadvantage"²¹) which, if carried to its logical conclusion could annihilate ARINC's right to service under §201(a).

In ¶ 5 of Appendix E, the FCC states:

"Nor can we accept ARINC's and SIAC's implicit view that Section 201(a) is independent of Section 202(a) *if provision of that service would place a carrier in violation of Section 202(a)'s proscription against unjust or unreasonable discrimination.*" 60 F.C.C.2d at 332 (J.A. 132) (emphasis added).

In this passage the FCC interprets the §202(a) discrimination provision as taking precedence over

²¹ Section 202(a) of the Communications Act reads, in full:

"It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. §202(a).

§201(a)'s imposition of a duty to serve, so that a customer who has a right to service could, nonetheless, be denied service to avoid "discrimination."

The FCC's quoted language assumes a situation where a carrier is performing its duty to provide service to one party, and does not serve a second party. The FCC states that the carrier's performance of its duty to the first party may itself "place a carrier in violation of Section 202(a)'s proscription against unjust or unreasonable discrimination." Obviously, such a result would be absurd if the carrier were free to eliminate the discrimination by cancelling service to the first party, which is owed service as a duty of the carrier under §201(a). If there is unlawfulness, it must be the carrier's improper refusal to serve the second party.

The two statutory provisions can easily be reconciled. If there is no duty on the part of the carrier to serve the second party, *i.e.*, if the request for service is not "reasonable" under §201(a), then the carrier's different treatment, in serving one party but not the other, is justified, and there can be no unjust discrimination under §202(a). On the other hand, if the FCC should find that the second party has a right to service under §201(a), the appropriate remedy is to order the carrier to provide service pursuant to §201(a). This will automatically eliminate any difference in treatment and, thus, obviate any inquiry into unjust discrimination. In short, if there is no duty to serve the second party, there can be no violation of §202(a); if there is a duty, the carrier's performance of that duty is necessary and sufficient to comply with both §201(a) and §202(a).

In fact, in the proceeding below, the FCC felt it "need not address" the arguments of the truckers (and bus owners who contended they should be recognized

as single customers. 60 F.C.C.2d at 336 (J.A. 140). In the absence of a finding that the carriers have a duty to serve these parties as customers, the FCC has not even established any basis for concluding that any difference in treatment between ARINC and these other parties is unjustified, and the FCC could not lawfully reach its conclusion that tariff provisions recognizing ARINC's customer status are "unjustly and unreasonably discriminatory."²²

B. The FCC's Action Is an Unjustified Departure from Its Ruling in *ARINC v. AT&T* that ARINC Is Entitled to Customer Status and Its Findings Below that ARINC's Communications Operations on Behalf of the Air Transport Industry "Serve an Important Public Function and Should Be Encouraged."

The FCC's 1937 decision in *ARINC v. AT&T* settled the question of whether ARINC had a right to order service as a customer for the air transport industry. The FCC's ruling consisted of two parts. First, the agency made basic public interest findings on the importance of ARINC's role. The FCC found that "the ever increasing number of planes, and the increasing speed at which they are propelled along the airways, renders desirable the development of a more extensive, efficient, and dependable communications system to pro-

²²The FCC viewed its extension of sharing and resale privileges to all customers as removing any differences between ARINC and the others. But even if that action by the FCC does not survive appellate review, it is clear from the argument above that the FCC cannot rely on any differences in treatment as a ground to require that service to ARINC be cancelled.

mote the safety of life and property in the air." *ARINC v. AT&T*, 4 F.C.C. at 163. Specifically, the FCC held that "[c]oordination [of radio service and wire facilities] through a single agency will tend to promote the safety of life and property in the air." *Id.*

Because only ARINC held aeronautical radio licenses and there was no indication that licensing any other entity would be in the public interest, the FCC concluded that "[t]he communication system which the Commission has found desirable in the interest of the safety of life and property in the air can, therefore, under present conditions, be operated only through such an agency as complainant corporation [ARINC]." *Id.* at 164.

The second aspect of the FCC's decision was its ruling on AT&T's contention that ARINC had neither a need for private line service nor a direct interest in the messages to be transmitted. On these questions, the FCC held that ARINC's role as licensee of non-public aviation radio frequencies, which were limited to the handling of messages relating to the safety of life and property in the air, meant that ARINC's principal function was "the promotion of that safety" and, hence, ARINC's need for private wire service "cannot be denied." *Id.*

Also, the FCC held that ARINC had a "direct interest in every message which it proposes to transmit over the wire facilities" because of ARINC's duties as a Commission licensee to provide for the collection and distribution of information and messages relating to that safety, and because ARINC "supervises and coordinates the whole of the national aviation communications system to accomplish those ends." *Id.* at 165.

Finally, the FCC distinguished ARINC's unique role from that of other entities who might wish to order and administer private line service for third parties:

"Ordinarily it might be that an agency created to handle the communications of its stockholders or members, with a view to profit for itself or savings to its stockholders or members, could not be said to have a direct interest in the communications it handles. Furthermore, such an agency might, in a sense, be receiving compensation for the handling of these communications for others. *The case before us, however, is distinct* in that the element of profit or saving, if any, to the stockholders, is purely incidental. Under the facts in the record neither defendant [AT&T] nor the stockholders of complainant corporation [ARINC] can, lawfully, perform or attempt to perform this primary service, which complainant performs, and in this respect, also the case is distinguished from such cases as the rule was designed to exclude. Complainant does not propose a service to 'others' or a 'resale' of a public utility service such as may reasonably be regarded to be within the prohibition of defendant's tariff rules." *Id.* at 166 (emphasis added).

In short, because of the special obligations imposed on ARINC as a radio licensee, the FCC held that AT&T must recognize ARINC as a customer for private line service to carry airline messages upon ARINC's reasonable request for such service. *Id.* at 167.

In the Report and Order below, the FCC did not expressly revise any part of the holding in *ARINC v. AT&T*, nor, indeed, did it challenge ARINC's demonstration that the 1937 decision "is still valid today." See 60 F.C.C.2d at 332 (J.A. 135). To the contrary, ¶12 of Appendix E reaffirmed the FCC's earlier

holding in *ARINC v. AT&T* that "the promotion of safety of life or property in the air through the use of wire and radio communications was adequately effectuated by requiring that AT&T treat ARINC as a single customer (4 F.C.C. at 166)." 60 F.C.C.2d at 335 (J.A. 138). Moreover, in its Reconsideration Order, the FCC explicitly referred to ARINC's operations in reaffirming that "[t]he sharing arrangements as described in the record in this proceeding are, in our view, convincing evidence that such communications operations serve an important public function and should be encouraged if we are to carry out our mandate under the Communications Act. See, e.g., ARINC Comments at 4-50 . . ." 62 F.C.C.2d at 595 (J.A. 161).

The FCC's decision to rule that the single customer tariff provision for ARINC is unlawfully discriminatory, insofar as it implies any right of a carrier not to serve ARINC as a customer, irreconcilably conflicts with its prior decision in *ARINC v. AT&T* and its findings in the proceeding below. Thus, this agency's conclusions on their face "deviate greatly from past pronouncements" and exhibit a failure to engage in "reasoned decision-making." *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 699 (D.C. Cir.), cert. denied, 423 U.S. 926 (1975); *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971). In consequence, the decision must be set aside by this Court unless the FCC has provided "sufficient explanation" for its action. 515 F.2d at 699.

The FCC's only attempt to distinguish *ARINC v. AT&T* from its present action was based on the assertion that "single customer status, insofar as it accords preferential rate treatment to several user groups, does present questions of unjust or unreasonable discrimination under Section 202(a)." 60 F.C.C.2d

at 333 (J.A. 133). The FCC appears to base this assertion on the fact that the FCC, in *ARINC v. AT&T*, though confirming ARINC's single customer status, declined to establish a special preferential rate for ARINC similar to the "press rates" and "Government Bulletin" rate. 60 F.C.C.2d at 332 (J.A. 133); see 4 F.C.C. at 167. The FCC states that "we found ARINC's request for private line teletypewriter service at press rates to be 'unreasonable' under Section 201(a) because it would be 'unjustly or unreasonably' discriminatory under Section 202(a)." 60 F.C.C.2d at 332-33 (J.A. 133). However, this statement is erroneous for there is no such finding or suggestion in *ARINC v. AT&T*.

The totality of the Commission's holding on ARINC's request for preferential rates in *ARINC v. AT&T* was that service to ARINC was not shown to be a "like service" to the press and government bulletin services and, therefore, AT&T's refusal to give ARINC a rate comparable to the press and government was not "discriminatory" against ARINC. 4 F.C.C. at 167. There was no suggestion that it would be unlawful if ARINC employed *existing* tariffs in an economical manner, and this is all it does under the present single customer provision.

II.

THE FCC'S ACTION WAS IRRATIONALLY OVERBROAD BECAUSE THE FCC'S ADVERSE FINDINGS RELATING TO ARINC'S CUSTOMER STATUS WERE LIMITED SOLELY TO THE QUESTION OF TELPAK RATES, AND CANNOT SUPPORT A GENERAL CONCLUSION ADVERSE TO ARINC'S CUSTOMER STATUS FOR ANY OTHER SERVICE.

There is no rational basis whatsoever for the FCC's broad ruling in Appendix E that ARINC's single customer status is unlawfully discriminatory. In the FCC's entire treatment of the issue, only one narrow ground is given for the finding of discrimination—that ARINC uses Telpak service which is priced at bulk rates not appropriate for smaller users.

The FCC “[a]t the outset” of Appendix E plainly asserts that “single customer status cannot be separated from the rate advantages accruing to an entity or group accorded this status.” 60 F.C.C.2d at 332 (J.A. 132). Following this initial assertion, virtually the entire discussion in Appendix E focuses on what is referred to in ¶6 as “ARINC’s discriminatory rate treatment” in using Telpak, rather than on ARINC’s single customer status *per se*. 60 F.C.C.2d at 333 (J.A. 134). First, in ¶¶8-9, there is a discussion of whether there is competitive necessity for ARINC to receive Telpak. 60 F.C.C.2d at 333-34 (J.A. 135-36). The FCC makes a large number of unsubstantiated and erroneous statements concerning whether private microwave is a realistic alternative to Telpak service for ARINC and the air transport industry.²³ The FCC’s conclusion is that ARINC and ATA “have not justified their single

²³The absence of a rational basis for this conclusion is demonstrated *infra*, pp. 33-36.

customer status, *insofar as TELPAK is available to the airlines, on the basis of competitive necessity.*" 60 F.C.C.2d at 334 (J.A. 136) (emphasis added).

Next, in ¶ 12, the FCC addresses whether public policy justifies ARINC's use of Telpak and concludes that "the statutory objective of promoting the 'safety of life and property through the use of wire and radio communications' *does not alone justify otherwise unlawfully discriminatory rates.*" 60 F.C.C.2d at 335 (J.A. 138) (emphasis added). In sum, in Appendix E, the FCC holds that "we find ARINC's single customer status *with respect to TELPAK* to be unlawful . . ." 60 F.C.C.2d at 336 (J.A. 140) (emphasis added).

There are absolutely no findings or conclusions in Appendix E, or anywhere else in the FCC's orders, that relate ARINC's single customer status to any service other than Telpak, even though the single customer provisions generally apply to all private line services. Yet, the "Conclusions" in the Report and Order are not limited to Telpak—indeed, they do not mention Telpak—but, without reservation, state that "we have concluded that the so-called 'single customer' provisions found in the carriers' tariffs are unjustly and unreasonably discriminatory, and accordingly unlawful." 60 F.C.C.2d at 321 (J.A. 109).

The Supreme Court has stated the basic administrative requirement that "the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Similarly, it has been held necessary that "agencies present sufficient support for their conclusions in order that the court can properly review their decision." *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 777 (D.C. Cir. 1974) (footnote omitted).

Here, the FCC has given no support whatsoever for outlawing ARINC's single customer status with regard to any service but the specific Telpak offering and, thus, has not met the above tests. Moreover, as shown below, the FCC's findings relating to Telpak are fatally defective in many respects.

III.

THE FCC'S CONCLUSIONS REGARDING TELPAK RATES ARE IRRELEVANT, UNLAWFUL, AND UNSUPPORTED.

A. The FCC, Without Notice, Improperly Decided Issues Relating to Telpak Rates, Which Were Not Involved in the Proceeding Below.

Issues relating to the lawfulness of Telpak rates are under investigation in the FCC's Docket No. 18128. The FCC expressly indicated that its proceeding on the Truckers' complaint, the forerunner of the single customer issue here, was "not concerned... with questions as to the justness or reasonableness of Telpak rates..." *American Trucking Associations v. American Telephone and Telegraph Co.*, 41 F.C.C.2d 2, 5 (1973). Also, in denying a request to expand the issues in the proceeding below, the FCC stated that rates should be considered in "a traditional rate investigation" and explicitly referred to Docket No. 18128 as investigating Telpak rates. 48 F.C.C.2d at 1079.

In spite of these disclosures, the Report and Order improperly purports to decide a key aspect of the lawfulness of Telpak rates: whether there is competitive necessity for Telpak due to the availability of a private microwave alternative for ARINC. Appendix E ¶¶ 7-9, 60 F.C.C.2d at 333-34 (J.A. 135-36).

Section 4 of the Administrative Procedure Act requires that notice of a proposed rulemaking indicate "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3). No notice was given that issues relating to the competitive necessity of Telpak were to be decided in this proceeding and the lack of notice was clearly prejudicial to ARINC and ATA.

While ARINC and ATA both referred to the competitive threat of an airline industry private microwave system in their submissions below²⁴ neither had any reason, based on the notice given by the FCC, to expect that issue to be resolved anywhere but in Docket No. 18128. Hence, no need was apparent to submit further evidence in the proceeding below, beyond that submitted in Docket No. 18128, particularly since the proceeding below was not even an evidentiary hearing. Yet the FCC, in Appendix E, asserts that "[b]ecause ARINC and ATA are the sole possessors of the information which would prove these 'exceptional facts' [regarding the threat of an ARINC/airline private microwave system], they carry the burden of proof with respect to the first criterion [of the competitive necessity issue]." 60 F.C.C.2d at 333 (J.A. 135).

The FCC then went on to charge ARINC and ATA with the failure to make a never-requested "supplemental showing" to the evidence in Docket No. 18128 of

"the actual microwave station sites selected to provide their nationwide private microwave system,

²⁴ Airline Exhibit 1 at 15-20 (J.A. 871-76); Exhibit 4 at 22-23 (J.A. 991-92); ARINC Comments at 27-28, 41-45 (J.A. 783-84, 797-801).

a reasonably exact estimate of the cost of building such a private microwave system, and an explanation of how they planned to deal with the frequency congestion problems in some areas." 60 F.C.C.2d at 334 (J.A. 136).

This statement was particularly surprising and unjustified because ARINC had provided a thorough and essentially unchallenged submission on all of these facts for the record in Docket No. 18128.²⁵ Since the final responses in the proceeding below were filed on April 25, 1975, nearly eleven months before the release of even the FCC staff's Recommended Decision in Docket No. 18128, it is clearly unfair to charge ARINC with having any notice that the FCC desired a supplemental filing on a major study which ARINC, at the time of the closing of the record below, had every reason to believe would be accepted by the FCC.²⁶

B. The FCC Failed To Accord ARINC and ATA a Full Evidentiary Hearing on the Complex Factual Questions Underlying the Competitive Necessity of Telpak.

The Comments and Reply Comments filed in the proceeding below did not raise any factual challenges to the propriety of the air transport industry's use of Telpak as a matter of competitive necessity. Nonethe-

²⁵Collins Radio Company, "Engineering Study for the Aeronautical Radio, Incorporated Communication System," ARINC Exhibit 6 (Docket No. 18128).

²⁶Indeed, Docket No. 18128 is still subject to petitions for reconsideration by the FCC, on the grounds, *inter alia*, that the FCC has yet to consider the Collins study. See ARINC Petition for Reconsideration (Docket No. 18128) at 14-16 (March 11, 1977).

less, in their Response ARINC and ATA indicated that if the FCC were to hypothesize "discrimination" and entertain action adverse to ARINC's status, a full evidentiary hearing would be required. ARINC and ATA Response at 22-23 (J.A. 1354-55).

The Report and Order bore out ARINC's and ATA's concerns, but, instead of a hearing, the FCC decided the complex factual issues bearing on the competitive necessity of Telpak without recourse to "adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence 'substantial' enough to support rates." *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1260 (D.C. Cir. 1973).

Regardless of the need for an evidentiary hearing on other aspects of the Report and Order, the specific adjudicative issues unfairly decided in Appendix E, such as the cost of private microwave to ARINC, the availability of financing to ARINC, and the subjective intent of ARINC to proceed with private microwave if its customer status should change, definitely required a full hearing.

A recent and highly significant decision of the D.C. Circuit held that to avoid evidentiary hearings:

"[w]here Congress has plainly given interested parties the right to a full hearing, the agency must show that the parties could gain nothing thereby, *because they disputed none of the material facts upon which the agency's decision could rest.*" *Independent Bankers Ass'n v. Board of Governors*, 516 F.2d 1206, 1220 (D.C. Cir. 1975) (emphasis added, footnote omitted).

ARINC and ATA plainly dispute the material facts underlying Appendix E and thus are entitled to such a "full hearing."

On an even more fundamental basis, in Appendix E, the Commission has engaged in "a proceeding that in form is couched as rule making . . . but in substance and effect is individual in impact and condemnatory in purpose." *American Airlines, Inc. v. CAB*, 359 F.2d 624, 631 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966). In Appendix E, the Commission attempts to adjudicate ARINC's specific, individual entitlement to service as a single customer, entirely apart from the "general policy questions" addressed in the basic Report and Order. Yet, as even Appendix D of the Report and Order recognizes, the denial of a full evidentiary hearing is not appropriate unless there is "the presence of general policy questions common to a large number of regulatees." 60 F.C.C.2d at 326 (J.A. 119).

C. The FCC's Conclusion that There Is No Competitive Necessity for ARINC To Obtain Telpak Rates Is Arbitrary and Capricious and Unsupported by Substantial Evidence.

The end result of the lack of notice and a full hearing on competitive necessity is the glaring inaccuracy and one-sidedness of the FCC's "analysis" of the issue. And, while we urge the Court to decide that the FCC erred in reaching this issue at all in the proceeding below rather than in Docket No. 18128, we shall indicate briefly the arbitrary and capricious nature of the FCC's determinations and the total absence of substantial evidence to support its conclusion.

A basic irrationality of the Report and Order's discussion of competitive necessity is its assertion in ¶ 8 that ARINC has failed to supply supposedly "critical" evidence—evidence, which, in fact, could not be

supplied under the circumstances. As stated in Appendix E:

"To date, however, ARINC never has introduced into the record evidence that: (a) its board of directors has authorized the construction of a nationwide private microwave system; (b) it has a contractual commitment from any financial institution to supply it funds at specific terms for the construction of a private microwave system; and (c) its member airlines endorse the construction of a system and are committed to purchasing service from such a system." 60 F.C.C.2d at 333 (J.A. 135).

Yet, every item on this list is one which cannot logically be expected to be shown with the degree of formality demanded by the FCC as long as ARINC has single customer status and is able to use Telpak. The formal arrangements suggested by the above items would only be made after the unavailability of Telpak service or other bulk service at reasonable rates was clear. Here, the FCC has had the lawfulness of Telpak under investigation since 1961. No party can reasonably be expected to make such formal authorizations and contractual commitments, pending the resolution of the FCC's litigation. For the FCC to treat the failure of the parties to demonstrate such formal arrangements as dispositive elevates form over substance and imposes an impossible barrier to demonstrating the competitiveness of private microwave.

To the extent Appendix E mentions the evidence in Docket 18128 bearing on competitive necessity at all, it grossly mischaracterizes it in order to claim that "[t]he accuracy of ARINC's [private microwave] study is questionable." The appendix asserts:

"(a) the cost data consists only of 'ball park' figures, i.e., very preliminary estimates; (b) they

contain no hard survey or cost information for the actual microwave station sites; and (c) they pay little attention to frequency congestion problems extant in some areas." 60 F.C.C.2d at 334 (J.A. 135).

In fact, in Docket No. 18128 ARINC submitted a 1400-page analysis of the specific equipment required on a site-by-site basis prepared, not by a consultant, but by Collins Radio Company, the nation's largest independent manufacturer of microwave equipment and for decades the industry leader in this field (ARINC Exs. 5 & 6; Tr. 7519-20).²⁷ Collins made preliminary map surveys and site selections relying upon the experience of the Collins Construction Division and three independent real estate companies (ARINC Ex. 5, p. 3; Ex. 5B, pp. 1-2; Ex. 6, p. 7-4; Tr. 7239, 7410-11). Finally, ARINC and Collins fully considered frequency congestion problems and proposed a combination of 2 GHz, and 12 GHz microwave facilities and almost 200 miles of coaxial cable in recognition of frequency congestion, and ARINC had located available conduit for the cable (ARINC Ex. 6, pp. 3-1, 3-7, 3-29; Tr. 9222).

Except for these invalid criticisms of the Collins study, the FCC makes no findings whatsoever of the competitiveness of private microwave, although the record in Docket No. 18128, purportedly relied on by the FCC, contained abundant proof that private microwave was a real competitive alternative for ARINC, fully justifying its use of Telpak. As a result of this mishandling of the record, the Court cannot make the necessary finding that "each of the order's essential elements is supported by substantial evidence." *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968). Not

²⁷ Citations are to the record in Docket 18128.

only does the FCC's conclusion on competitive necessity lack the support of substantial evidence, it is devoid of any supporting evidence whatsoever.

CONCLUSION

For the reasons given, Petitioners ARINC and ATA request the Court to reverse the FCC's Report and Order and Reconsideration Order insofar as they find tariff provisions recognizing ARINC's single customer status to be unlawful.

Respectfully submitted,

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